

**Objection to Revocation of Conditional Approval and Denial
Of Application for Asbestos Training Course
SWC Institute
2018 OEA 56 (Cause No. 18-A-J-5017)**

OFFICIAL SHORT CITATION NAME: When referring to 2018 OEA 49, cite this case as **SWC Institute, 2018 OEA 56.**

Case name: Objection to Revocation of Conditional Approval and Denial of Application for Asbestos Training Course, SWC Institute

Cause No. 18-A-J-5017

Topics:

Pro se
Asbestos
Asbestos training
326 IAC 18-2-14
326 IAC 18-2-6
326 IAC 18-2-8
Violations
Paperwork
Admission

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:	Jessica Reiss
Petitioner:	unrepresented

Order issued: November 19, 2018

Index category: Air

Further case activity: Judicial Review

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE
OF ENVIRONMENTAL ADJUDICATION

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5. This matter was set for a hearing on October 5, 2018. On September 20, 2018, IDEM filed its Motion for Summary Judgment and Motion to Postpone Adjudicatory Hearing. The presiding ELJ issued a case management order continuing the hearing until October 19, 2018 and setting an expedited schedule for briefing. SWC did not file a response to the Motion for Summary Judgment. IDEM filed a reply on October 12, 2018.
6. Gustavo De La Espriella is the sole stockholder/director/officer for SWC. He represented SWC. He is not an attorney. He was advised of the following at the hearing:
 - a. He may not make or address legal arguments on Petitioner's behalf;
 - b. Failure to raise any such legal arguments may result in such arguments being waived in this proceeding or in judicial review.

He was offered an opportunity to continue the hearing and retain legal counsel. He declined to do so.

7. Mr. De La Espriella admitted to the facts regarding the underlying reasons for the revocation and denial.
8. Further, Mr. De La Espriella testified that he retained a consultant to assist him in establishing standard operating procedures to address the deficiencies cited by IDEM. His consultant, Mr. Hector Teran, testified that he is a consultant in OSHA safety training and that SWC had retained him for a year to establish written procedures.
9. The Petitioner introduced a compliance plan (Exhibit 2, referred to as the Plan) prepared by Mr. Teran to address the deficiencies in SWC's standard operating procedures.

Conclusions of Law

10. IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
11. Pursuant to I.C. § 4-21.5-7-5, "an environmental law judge is the ultimate authority under this article for reviews of agency actions of the department of environmental management..."
12. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

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13. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "*De novo* review" means that, "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).
14. IDEM may revoke approval of a training course in accordance with 326 IAC 18-2-11 for the following reasons:
- (a) The department may revoke the approval of a training course if the training course provider:
 - (1) Violates any of the following:
 - (A) A requirement of this rule.
 - (B) A requirement of the Asbestos-Containing Materials in Schools Rule.
 - (C) A requirement of the Asbestos Model Accreditation Plan Rule.
 - (D) Any other federal, state, or local regulation.
 - (E) Any other laws pertaining to asbestos.
 - (2) Falsifies information on an application for approval.
 - (3) Fails to meet any qualifications specified in sections 3 through 9 and 13 of this rule.
 - (4) Misrepresents the extent of a training course's approval.
 - (5) Fails to submit required information or notifications in a timely manner.
 - (6) Fails to maintain requisite records.
 - (7) Falsifies accreditation records, instructor qualifications, or other accreditation information.
 - (b) The department may revoke the approval of a training course if an approved training course instructor or other person with supervisory authority over the delivery of training has been found in violation of other asbestos regulations and other laws administered by the U.S. EPA, the department, or from a state that has an accreditation plan approved by the U.S. EPA.
15. IDEM has requested summary judgment in this matter. The OEA shall consider a motion for summary judgment "as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure." I.C. § 4-21.5-3-23. Trial Rule 56 states, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." There are no genuine issues as to the facts regarding the violations. SWC did, in fact, commit the

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violations. It is also clear that the above regulation clearly authorizes IDEM to revoke a license under certain circumstances. However, it does not necessarily follow that just because SWC violated the cited provisions that revocation is the appropriate penalty. As there is a factual issue whether the penalty selected by IDEM is appropriate, summary judgment should not be granted as to the appropriate penalty.

16. It is clear that the Petitioner committed violations of the specified rules, as Mr. De La Espriella has admitted to this. All of the violations were paperwork violations. None resulted in the release of asbestos to the environment or in any untrained person's exposure to asbestos. There were no allegations that SWC did not provide training; that the training was in any way inadequate or not in compliance with the applicable rules; or that any person received a license or worked as an asbestos worker without training. The compliance plan is reasonably intended to bring SWC into compliance with Indiana regulations. As the Petitioner acknowledges deficiencies and has a compliance plan, putting SWC on probation to implement the Plan to train qualified workers is more protective of the environment than license revocation.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner's Petition for Review is GRANTED. Judgment is entered in favor of the Petitioner in accordance with the following terms:

1. IDEM's revocation is reversed. Petitioner shall be granted a probationary license to provide asbestos training courses subject to the following conditions.
2. Petitioner shall comply with all applicable statutes and regulations.
3. Petitioner shall, upon the effective date of this Order, implement the Plan presented as Exhibit 2, which is attached and incorporated herein.
4. Petitioner's probationary license is effective upon the effective date of this Order and shall expire one year from the date of effectiveness.
5. The probationary license shall be automatically revoked if Petitioner violates any of the following regulations on two (2) occasions within one year:
 - a. Failure to meet pre-course notification requirements in 326 IAC 18-2-14(a) and post-course notification requirements in 326 IAC 18-2-14(2), including but not limited to, applicants submitting training certificates from SWC but not appearing on official training roster submitted to IDEM.
 - b. Failure to verify that students possessed valid Indiana initial and refresher

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training before granting course admission in accordance with 326 IAC 18-2-6(6).

- c. Failure to submit the annual re-approval application in a timely manner in accordance with 326 IAC 18-2-8. Providing training courses after approval has expired contrary to 326 IAC 18-2-8(d) and 326 IAC 18-2-9.

6. IDEM retains the right to take any enforcement action authorized by the applicable statutes and regulations for any violation other than those specified above, subject to Petitioner's right to review under I.C. § 4-21.5-3.

The parties are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order, subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 24th day of October, 2018 in Indianapolis, IN.
Hon. Catherine Gibbs
Environmental Law Judge

IN THE MATTER OF:)	
)	
OBJECTION TO THE REVOCATION OF)	
CONDITIONAL APPROVAL AND DENIAL OF)	CAUSE NO. 18-A-J-5017
APPLICATION FOR ASBESTOS TRAINING COURSES))	
SWC INSTITUTE)	

**FINAL ORDER MODIFYING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

On October 24, 2018, the presiding Environmental Law Judge (ELJ) issued Findings of Fact, Conclusions of Law and Final Order in this cause. On November 9, 2018, the Indiana Department of Environmental Management (IDEM) filed its Motion to Clarify. Thereafter, on November 16, 2018 the presiding ELJ spoke with Gustavo De La Espreilla regarding the deadline to respond to the motion. On November 16, 2018, Mr. De La Espreilla filed a response via email. Pursuant to I.C. § 4-21.5-3-31, the presiding ELJ, having considered the motion and response, now modifies the final order as follows:

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that
the Petitioner's Petition for Review is GRANTED.** Judgment is entered in
favor of the Petitioner in accordance with the following terms:

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1. ~~IDEM's revocation is reversed. Petitioner shall be granted a probationary license to provide asbestos training courses subject to the following conditions:~~
2. **Any applications submitted to the Office of Environmental Adjudication shall be submitted to the IDEM for review and approval.**
3. **Petitioner shall comply with all applicable statutes and regulations. Petitioner shall apply to IDEM for Approval to provide the following training courses:**
 - a. **Asbestos Contractor/Supervisor Refresher Training Course**
 - b. **Asbestos Worker Refresher Training Course (Spanish)**
 - c. **Asbestos Work Initial Training Course (Spanish)**
 - d. **Asbestos Contractor/Supervisor Initial Training Course**
4. **IDEM shall review the applications for Approval and shall provide Petitioner with at least two (2) opportunities to correct any deficiencies.**
5. **Any instructor approved prior to the filing of the Petition for Review remains approved. Petitioner shall apply for approval of new instructors in compliance with the applicable laws and regulations.**
6. **Petitioner shall, upon the effective date of this Order, implement the Plan presented as Exhibit 2, which is attached and incorporated herein. The Petitioner may revise the Plan as necessary to comply with the applicable laws and regulations.**
7. ~~Petitioner's probationary license is effective upon the effective date of this Order and shall expire one year from the date of effectiveness.~~
8. ~~The probationary license shall be automatically revoked if Petitioner violates any of the following regulations on two (2) occasions within one year:~~ **The IDEM may not deny Approval based on any violations alleged to have occurred prior to the effective date of this Order, of any of the following regulations:**
 - a. Failure to meet pre-course notification requirements in 326 IAC 18-2-14(a) and post-course notification requirements in 326 IAC 18-2-14(2), including but not limited to,

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- applicants submitting training certificates from SWC but not appearing on official training roster submitted to IDEM.
- b. Failure to verify that students possessed valid Indiana initial and refresher training before granting course admission in accordance with 326 IAC 18-2-6(6).
 - c. Failure to submit the annual re-approval application in a timely manner in accordance with 326 IAC 18-2-8. Providing training courses after approval has expired contrary to 326 IAC 18-2-8(d) and 326 IAC 18-2-9.
9. IDEM retains the right to take any enforcement action authorized by the applicable statutes and regulations for any violation other than those specified above, subject to Petitioner's right to review under I.C. § 4-21.5-3.
10. **The Petitioner's request for a stay of effectiveness was not granted. Therefore, this Order has no retroactive effect.**

The parties are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order, subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 19th day of November, 2018 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge